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Br. of Guthrie, Mayes, Fentress & Dickinson for Appt.

MISSISSIPPI TAX CASES.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed April 4, 1900.

No. 319

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

WIRT ADAMS, State Revenue Agent, *et al.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
NOEL GALE,
For the appellant.

JAMES FENTRESS,
J. M. DICKINSON,
Of counsel.

WASHINGTON, October Term, 1899.

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vs.

WIRT ADAMS, State Revenue Agent, *et al.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT.

This appeal presents for review a final decree of the Circuit Court of the United States for the Southern District of Mississippi (record, p. 133), which dismissed the bill of complaint for want of jurisdiction. The appeal was prayed and allowed under section 5 of the Act of March 3, 1891 (*id.*, pp. 133–135), and the judge holding the circuit court certified as follows:

> "The question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:
>
> "1. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship. Defendants claim that complainant's interest was derivative through the Yazoo & Mississippi Valley Railroad Company, and that the complainant had no right to raise jurisdiction in the Federal courts by making the Yazoo & Mississippi Valley Railroad Company a party defendant in the cause.
>
> "2. That the complainant by its original bill showed no jurisdiction in this court because of the subject-matter stated, inasmuch as the bill set forth no proper Federal question.

"3. That there was no jurisdiction in this matter because the bill was a suit against the State of Mississippi and in violation of the eleventh amendment to the Constitution of the United States" (record, p. 140).

Notice was given of motions to dismiss or affirm, returnable March 26, 1900, but these motions were postponed to the hearing on the merits. The jurisdiction of the Circuit Court is claimed on the ground that the suit is one of "a civil nature . . . in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, *and arising under the Constitution or laws of the United States.*"[1] Jurisdiction is also claimed by reason of diverse citizenship (*id.*, pp. 1, 2).

So far as the present appeal is concerned, the case presents in substance the same questions of jurisdiction here and below as are involved in Nos. 318 and 320, the contract claimed to be impaired being of the same tenor as that involved in No. 320, providing for the appropriation of taxes to the payment of construction debt, and not, as in No. 318, for an exemption from taxation. Counsel for the appellant desire to make a statement of the facts necessary to the consideration of the appeal, showing the jurisdiction both of this court and of the circuit court, and to specify the errors complained of, and pray leave to refer to their brief filed in No. 318 for a discussion of the questions of law arising upon the record, which are conceived to be the same in this case as in Nos. 318 and 320.

Statement of the case.

The bill of complaint was filed by the Illinois Central Railroad Company, a corporation of the State of Illinois,

[1] Act of August 13, 1888, 25 Stat. 434.

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against Wirt Adams, state revenue agent, and the members and clerk of the Railroad Commission of Mississippi, all citizens of Mississippi, and the Yazoo and Mississippi Valley Railroad Company, a corporation of that state (record, pp. 1, 2), for the purpose of restraining the enforcement of taxes for the years 1886 to 1891 inclusive, alleged to be imposed in violation of the contract clause of the Federal Constitution and of the Fourteenth Amendment (*id.*, p. 21).

The bill of complaint alleged the incorporation of the Natchez, Jackson and Columbus Railroad Company in 1870 and set forth as part of its charter the contract relied on (*id.*, pp. 5, 6):

> "SECTION 21. Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional burdensome taxation upon the people, the State hereby agrees with said company (and which agreement is irrepealable), that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State, and municipal, to which said company shall be subject: Provided, however, that whenever the profits of said company shall enable

it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

After quoting the provision of the Constitution of Mississippi of 1869 that the property of corporations should be "subject to taxation," the bill set forth the decision of the Supreme Court of Mississippi, in *Mississippi Mills* v. *Cook*, 56 Miss. 40, 50, to the effect "that the words of section 13, article XII of said constitution aforesaid, did not require any legislature to tax the property of corporations for pecuniary profits, and that the words 'shall be subject to,' did not mean subjected to; or, in other words, that said provision is mandatory, not that the property of the corporation shall be taxed (that is left to the legislature), but such property shall ever be subject to, *i. e.*, liable—to be taxed, if the legislature so will" (record, p. 8). It was alleged that this adjudication had been followed in many cases since its decision in April, 1878, and had for twenty years been the settled law and rule of property of the state, and had been adopted and acted upon by the legislative, executive and judicial departments (*id.*, pp. 5, 8).

The bill then alleged the construction of the railroad, which was not begun for several years, and the main portion of which was built after the decision in *Mississippi Mills* v. *Cook;* the issue of its capital stock to the amount of $2,028,000, and of its bonds to the amount of $1,250,000. It was also alleged that the railroad was constructed and its liability on bonds and floating debt incurred on the faith of and relying on the contract above quoted and the

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judicial decision affirming its validity (record, pp. 10, 11).

The bill then alleged the creation of the Louisville, New Orleans and Texas Railway Company by consolidation, the building of its road in the years 1882–1884, and the passage in 1890 of an act authorizing the Natchez Company to sell its railroad and "all franchises, rights, powers, privileges and immunities" to the L., N. O. & T. Company (*id.*, p. 13).

It was alleged that, at the time of the passage of the act authorizing the sale, the Natchez Company had for many years been in the actual enjoyment, "openly and notoriously," of the privileges conferred by said contract and that such privilege, also contained in the charter of the L., N. O. & T. Company, had been expressly decided by the state Supreme Court to attach to such property of the railway company as was "necessary to the construction, equipment, maintenance and operation of its road" (*id.*, pp. 13, 14). The bill then stated that in reliance upon the contract, as made part of the charter of the Natchez Company, and upon the decisions of the state Supreme Court, upon the fact of the enjoyment of the privilege under section 21 by the Natchez Company for twelve years, and upon the repeated refusal of the legislature to repeal said privileges, the L., N. O. & T. Company paid the Natchez Company $180,000 in cash for the equity of redemption in its property, and also assumed payment of its bonds amounting to $1,250,000, which the L., N. O. & T. Company afterwards purchased, paying therefor $800,000 of its own gold bonds, which were a lien on its entire line of railroad (*id.*, p. 14). A copy of the conveyance upon such sale is annexed to the bill, from which it appears that the Natchez Company conveyed "all the railroad and other property of the party of the first part

lying, being and situated in the State of Mississippi, together with all franchises, rights, powers, privileges and immunities unto said party of the first part appertaining or belonging" (record, p. 35).

The bill then alleged that the privilege of the Natchez Company under section 21, the right to transfer the same, and the transfer itself, "were contracts which the respective parties thereto had a right to make at the time they were made and entered into, in view of the settled law as declared to them by the supreme court of said State at the time when such agreements were formed;" that the contracts were valid under the constitution and laws of the state as the same had been previously expounded; and that the obligation of the contract and the privilege under section 21 were binding upon the state and not to be impaired by subsequent change of judicial decision (*id.*, p. 15). It was then stated that section 21 was a contract "within the meaning of the Constitution of the United States, which forbids any State to pass a law impairing the obligation of a contract" (*ib.*).

The bill then stated the ownership by the complainant of all but four shares of the capital stock of the Yazoo Company, which company in turn owned a large portion of the capital stock of the L., N. O. & T. Company, and alleged that the complainant had purchased $13,805,000 of the first mortgage bonds, $8,731,000 of the second mortgage bonds, and $8,347,000 of the income mortgage bonds of the L., N. O. & T. Company, all of said purchases being made in reliance upon the aforesaid legislation and decisions of Mississippi (*id.* pp. 17, 18). It was also stated that the $1,250,000 bonds of the Natchez Company acquired by the L., N. O. & T. Company had been used as collateral security for its first and second

mortgage bonds, including those purchased by the complainant, thus in effect including in the first and second mortgages of the L., N. O. & T. Company the property and immunities acquired from the Natchez Company, and passing to the complainant as part of its security the lien upon the property, immunities and franchises of the Natchez Company (record, p. 18).

The bill then stated the merger of the existence of the L., N. O. & T. Company into that of the Yazoo and Mississippi Valley Railroad Company, and alleged that all of the property, rights, franchises, privileges and immunities of the former company were transferred to and became the property, rights, privileges, franchises and immunities of the Yazoo Company. It was averred that such consolidation was effected on the faith of the previous legislative enactments already stated, and that a material part of the contract of consolidation was the fact that thereby the privilege of section 21, as applied to the taxes to be assessed against the property of the original L., N. O. & T. Company, as well as against the property acquired by it from the Natchez Company, should pass to and be enjoyed by the Yazoo Company (*id.*, p. 19). The case of *Railroad Co.* v. *Lambert*, 70 Miss. 779, 787, was then referred to as deciding that the rights under section 21, as acquired by the L., N. O. & T. Company by the sale from the Natchez Company, also passed to the Yazoo Company by the consolidation, and as reaffirming the doctrine of *Mississippi Mills* v. *Cook*, and holding that the privilege under section 21 enured to the L., N. O. & T. Company and to the Yazoo Company as to the property formerly of the Natchez Company, and that after the *Lambert* decision the complainant, in reliance thereon and on the previous decisions, issued and paid out many

of its own bonds in payment of obligations and indebtedness of the L., N. O. & T. Company, and in improvements, etc., thereon (record, p. 20).

The bill then showed the decision of the Mississippi Supreme Court in *Adams* v. *Yazoo and Mississippi Valley Railroad Company* (now under review in No. 244 on the docket of this term), holding, among other things, that section 21 was void under the constitution of 1869, thus overturning and reversing the "settled constitutional construction and the constitutional status of said statute and of similar statutes which had been repeatedly declared valid by the supreme court itself for fully twenty years," and had been commonly accepted and acted upon by all the departments of the state government, and by the constitutional convention of 1890 (*id.*, p. 21). It was averred that the last-mentioned decision, when sought to be practically applied, was not only subversive of the contract rights already set forth by giving effect to subsequent legislation, but also was in conflict with the Fourteenth Amendment in that it amounted to a deprivation of property without due process of law, and denied the equal protection of the laws (*ib.*), this resulting from the imposition of charges by retrospective assessments which created liabilities not in existence when complainant's rights were acquired.

The proceedings of the state revenue agent for the purpose of proceeding under the state law of 1894 to assess the property formerly of the Natchez Company for taxes between the years 1886 and 1891, inclusive, were stated, and it was alleged that the Railroad Commission had proceeded to assess such taxes against the Yazoo Company as owner at this time, and against the Natchez Company as owner during the years 1886 to 1890 inclu-

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sive, and against the property, at the rates therein stated, the total assessment thus made amounting to upwards of $50,000 (record, pp. 21, 22).

It was then alleged that in the years from 1886 to 1889, inclusive, the Natchez Company paid in each year, and in the years 1890 and 1891 the Louisville Company paid in each year, taxes assessable against the property of the Natchez Company, such taxes being paid on the construction debt of the Natchez railroad in conformity with section 21, and that these companies were in each of said years, respectively, qualified to make the affidavits provided for in section 21, and to have the receipts therein mentioned. It was stated that the Natchez and Louisville Companies were each extinct; that there were no officers of such companies qualified under their charters to make affidavits as provided in section 21, and that if the assessments for the years 1886 to 1891, inclusive, were to stand, the affidavits could not be made, although the conditions of section 21 as to payment on construction debt had been fully complied with (*id.*, pp. 23, 24).

The bill averred that suits had been brought for the recovery of the taxes upon the Natchez property for the years 1892 to 1897, inclusive, and for the taxes upon property originally belonging to the L., N. O. & T. Railway Company for the years 1886 to 1891, inclusive, and still other suits for the recovery of taxes upon the property originally of the Louisville Company for the years 1892 to 1897, inclusive (No. 244), in all of which suits the revenue agent attacked the validity of section 21 (*id.*, p. 29). The bill then stated that if taxes upon the Natchez property for the years 1886 to 1891, inclusive, should be collected, the

result would be that the sum of $60,000 would be paid out of the net earnings of that property, and to that extent would reduce the earnings of that property and of the property derived from the L., N. O. & T. Company, to the loss of the complainant and other holders of its second mortgage and income bonds, in each case the loss of the complainant being about four-fifths of the whole amount of taxes to be so collected; and that, if the revenue agent should prevail in the suits mentioned, further loss and damage would be inflicted upon the complainant and other holders of the second mortgage bonds to the amount of $1,080,000, of which $475,000 would be on account of transactions prior to the purchase of any of the bonds by the complainant in 1892, and under a claim not made until long after such purchase, and by means of retroactive assessment of taxes; and it was alleged that such collection of said taxes would impair the obligation of the complainant's contract of purchase of the bonds, in violation of the Federal Constitution, and would also deprive it of its property without due process of law, and would withhold from it the equal protection of the laws, in violation of the Fourteenth Amendment (record, pp. 29, 30).

It was then stated that under the laws of Mississippi the assessment about to be made by the railroad commission would become a public record in the counties and municipalities along the line of road, and that the tax collectors thereof were required to collect the same by seizure of the railroad company's property if the tax were not voluntarily paid; that the railroad commission threatened to send the record of assessment to the clerks of certain counties and to the authorities of certain municipalities through which the railroad ran, and that the complainant

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was thus threatened with a multiplicity of seizures and suits (record, pp. 31, 32). It was also alleged that the revenue agent threatened to bring suits for the recovery of the taxes, and the complainant asked that, to prevent multiplicity of suits, the court adjudicate the matters involved (*id.*, p. 32). The bill also stated that the assessments when made would constitute a lien upon the property of the Natchez Company preferential to the mortgages and other liabilities, and would cast a cloud upon the title, to the injury of the complainant and the holders of the first mortgage bonds of the Natchez Company and of the first and second mortgage bonds of the L., N. O. & T. Company, and invoked jurisdiction to prevent such cloud (*ib.*). It was also averred that a payment under protest would not avoid a multiplicity of suits, and that judgment against the various counties and municipalities would be of doubtful utility, because of their special organization and of costs and expenses, and that, so far as a suit against the state was concerned, a judgment would be of no value, because not enforceable by execution, thus leaving the complainant and the Yazoo Company without effectual remedy at law (*id.*, pp. 32, 33).

The prayer of the bill was for an injunction restraining the railroad commission from approving and certifying to the counties and municipalities the assessment on the railroad formerly of the Natchez Company for the years between 1886 and 1891 inclusive, and restraining the revenue agent from suing for the recovery of such taxes, or for the enforcement of the alleged lien thereof, and from "taking any proceeding looking to the subjection of the property of your orator, or of the railroad known as the Natchez & Jackson railroad, to the payment of the taxes so claimed;" and also for a decree that

the property of the complainant and the Natchez railroad was exempt from state and county taxation for such years, that the contract under section 21 be declared valid and binding, and that the assessment be decreed null and void, "and the cloud upon the title and right of your orator aforesaid be removed" (record, pp. 33, 34).

In substance, the bill thus showed a contract with the state for payment of taxes in a certain way; the right and interest of the complainant in that contract as a holder of bonds secured upon the property affected, and of stock in a proprietary company; the contracts evidenced by the bonds and by the mortgage securing the same; the attempted impairment of these contracts by subsequent legislation of the state; the extinction of the corporation, the bonds of which gave the complainant its interest and supported its right to sue; and the facts which gave jurisdiction in equity.

A restraining order was granted in accordance with the prayer of the bill in that respect (*id.*, p. 87) and was afterwards discharged by interlocutory order on the ground that the Circuit Court had no jurisdiction of the cause (*id.*, p. 128). An appeal from this order was dismissed by the Circuit Court of Appeals on the ground that that court had no jurisdiction of the appeal (*id.*, p. 133). A final decree was then entered in the Circuit Court dismissing the bill (*ib.*) from which the complainant prayed an appeal to this court, the only error assigned being the action of the court below in dismissing the bill for want of jurisdiction (*id.*, pp. 133, 134). The order granting the appeal stated: "This appeal is granted solely upon the question of jurisdiction, *this court having refused to assume jurisdiction in this cause*" (*id.*, p. 135).

The certificate has been quoted. The proceedings in

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the Circuit Court and the Circuit Court of Appeals were in all respects similar to those in No. 318, and, except as to jurisdiction claimed by reason of diversity of citizenship, to those in 320. After the dismissal of the appeal by the Circuit Court of Appeals, but before the dismissal of the bill in the Circuit Court, the state revenue agent brought suit in the Chancery Court of Hinds County, Mississippi, and therein recovered judgment against the appellant for the same taxes involved in this suit. An appeal has been taken from that judgment to the Supreme Court of Mississippi and remains undetermined. This appears from the affidavit of the appellee on file.

Specification of Errors.

The appellant specifies the following errors of the court below:

1. That the court erred in refusing to assume jurisdiction based on diversity of citizenship.
2. That the court erred in refusing to assume jurisdiction because of the alleged lack of a federal question.
3. That the court erred in refusing to assume jurisdiction on account of the Eleventh Amendment.

I.

EFFECT OF THE SUBSEQUENT JUDGMENT IN THE STATE COURT.

The subsequent suit and judgment for the recovery of taxes here involved can have no effect upon the jurisdiction of this court to entertain the appeal nor upon the jurisdiction of the Circuit Court to entertain the suit. The proper course is for the Circuit Court to determine the validity of this defense when interposed by plea and established in evidence. *Huntington* v. *Laidley*, decided March 19, 1900.

II.

JURISDICTION OF THIS COURT.

The appeal involves only questions of the jurisdiction of the Circuit Court as a court of the United States and

under the Federal Constitution and laws (*Huntington* v. *Laidley*, *supra*); and the practice followed was regular. *Shields* v. *Coleman*, 157 U. S. 168, 176; *Colvin* v. *Jacksonville*, 158 U. S. 456, 458.

III.

THE JURISDICTION OF THE CIRCUIT COURT.

The allegations of the bill of complaint make a case arising under the Federal Constitution and clearly within the jurisdiction conferred by the Act of August 13, 1888. *City Railway Co.* v. *Citizens' Street Railroad Co.* 166 U. S. 557, 562.

IV

THE SUIT IS NOT ONE AGAINST A STATE.

Attempted legislation in conflict with the Federal Constitution affords no protection to the acts of so-called state officers assuming to act under the authority of such legislation (*Fitts* v. *McGhee*, 172 U. S. 516, 529; *Virginia Coupon Cases*, 114 U. S. 270, 288); and as to county and municipal taxes which here constituted the greater part of the amount in controversy, the Eleventh Amendment certainly does not apply. *Lincoln County* v. *Luning*, 133 U. S. 529.

Conclusion.

For these reasons and upon the authorities contained in our brief in No. 318, it is submitted that the decree of the circuit court should be reversed and the cause remanded for further proceedings.

Washington, October Term, 1899.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
NOEL GALE,
For the appellant.

JAMES FENTRESS,
J. M. DICKINSON,
Of counsel.

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